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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of:	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIMITED PARTNERSHIP	)	
	)	
For Construction Permit	)	
for an FM Broadcast Station	)	
	)	
	)	
Biltmore Forest,	)	
North Carolina	)	
	)	
To: The Commission	)	

RESPONSE TO COMMENTS OF THE ENFORCEMENT BUREAU

Respectfully submitted,

WILLSYR COMMUNICATIONS,  
LIMITED PARTNERSHIP

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February 29, 2000

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## RESPONSE TO COMMENTS OF THE ENFORCEMENT BUREAU

Willstyr Communications, Limited Partnership ("Willstyr"), by its counsel, hereby submits its response to the comments of the Enforcement Bureau, filed on February 14, 2000. The hearing parties were given the opportunity to file a response within fifteen (15) days.

### False Certification Issue

The Enforcement Bureau, in its comments, at pp. 9-11, paras. 14-17, urges that no issue be specified against Liberty as to false certification of its eligibility for a bidding credit. According to the Bureau, at p. 11, para. 17, there is no evidence that any of the "factual" assertions made by Liberty are false.

The Bureau ignores Commission precedent that intent to deceive can be inferred from an applicant's disingenuous representations as to its interpretation of a rule or policy. Only if the interpretation is the result of an honest mistake would it not be disqualifying. See, High Country Communications, 4 FCC Rcd 6237, 6238 (1989).

Here, Liberty falsely certified in September 27 and November 10, 1999, submissions that it was entitled to a 35% bidding credit because it had no agreement with Cumulus Broadcasting as of August 20, 1999. This is both a factual assertion and a legal conclusion.

In view of the Commission's September 17, 1999, Public notice, DA 99-1912, p. 6, explicitly stating that changes in ownership attribution after August 20, 1999, could result in a diminishment of the bidding credit claimed on August 20, Liberty was squarely

put on notice that it was not entitled to the bidding credit it had claimed under penalty of perjury.

Accordingly, Liberty's false claim for a bidding credit was not an honest mistake of interpreting the law, but rather an intentional and calculated gamble that it would not be challenged in claiming a bidding credit, and if it was challenged, the Bureau would only want to take the money and impose no penalty. The Bureau has lived up to Liberty's expectations --- that with auctions, it is only a matter of money, not integrity.

#### Ownership Misrepresentation Issue

The Bureau, at pp. 12-13, paras. 19-20, urges that an ownership misrepresentation issue not be specified against Liberty. According to the Bureau, there are no facts alleged calling into question that David T. Murray is not a limited partner of Liberty, nor is there any motive for Liberty to misrepresent Murray's lack of limited partnership status.

The Bureau is blinded to the legal significance of Liberty's admission that its general partner and its sole limited partner have had no communications with each other of any kind, directly or indirectly, including financial contributions from the limited partner, for 10 years (since 1990). This is not the normal insulation from management and media activity expected of a limited partner under Commission policy.

Under the Commission's insulation policy, a limited partner would be expected to get regular status reports from the general partner as to the condition and well-being of his investment. The

only inference that can be drawn from the lack of any communications whatsoever between the general and limited partner for 10 years is that the limited partner no longer cares about the condition and well-being of his investment because he is no longer involved, either resulting from abandonment or de facto ouster from the partnership.

Liberty could have conclusively refuted Willsyr's allegations by submitting an affidavit from Murray stating that he is still a limited partner in good standing. Liberty's failure to do so and Murray's silence reaffirms the inference that he is not now a limited partner of Liberty.

Liberty would have a compelling motive to withhold from the Commission the fact of Murray's abandonment or ouster from the partnership. Such a voluntary change in 65% of Liberty's ownership structure, would have required a showing of "good cause" to amend and would also have called into question its financial qualifications.

It appears again that with auctions, the Bureau is concerned only with getting the money from the high bidder. Integrity is no longer of any consequence.

Liberty's November 10, 1999 Amendment

The Bureau, at pp. 13-14, paras. 21-22, contends that Willsyr's opposition to Liberty's November 10, 1999, amendment (and that of Orion) should be dismissed as an unauthorized pleading. According to the Bureau, the opposition was not authorized under either 47 CFR 1.229 or 73.3522.

The Bureau ignores 47 CFR 1.294 (a) which gives any hearing party the right to file an opposition to an interlocutory request in that proceeding. Willsyr and Orion are parties to a hearing to determine Liberty's qualifications. Liberty's amendment was an interlocutory request in the hearing. Accordingly, Willsyr and Orion have the right to inform the Commission, by means of an opposition, that the interlocutory request is defective and not grantable.

The Bureau, at p. 14, para. 22, contends that tower site availability is no longer considered and thus the amendment proposing a new tower site should be accepted. However, the auction rulemaking, at 13 FCC Rcd 15966, 15988 (1999), while deleting tower site availability issues, did not mention eliminating the requirement of "good cause" where the tower site issue had been previously litigated under the pre-auction rules.

The Bureau's position is moreover fundamentally at odds with the Commission's position in Damsky v. FCC, decided January 7, 2000. There, the Commission refused to allow an applicant that had been disqualified under a basic issue (with no misrepresentation), and whose disqualification had not become final, to participate in the September 1999 auction. The D.C. Circuit upheld the Commission in denying the disqualified applicant the right to participate in the auction.

Accordingly, if a non-final disqualification of a basic issue is a bar to participation in the auction, how could the Commission allow Liberty to participate in the auction and then delete its

adjudicated disqualification simply because it participated in the auction? Willsyr is raising this issue of disparate application of the rules in its appeal of the auction rulemaking that is now before the D.C. Circuit.

#### Tower Site Misrepresentation Issue

The Bureau, at pp. 14-19, paras. 23-33, urges that the tower site misrepresentation issue specified against Liberty be resolved in its favor. This is in spite of ALJ Walter C. Miller resolving the issue adversely to Liberty.

The Bureau, in urging reversal of the ALJ, ignores that both the burden of proceeding with the evidence and the burden of proof were placed upon Liberty. Indeed, the Bureau's comments suggest that these burdens were on the tower site owner, Vicky Utter, a non-party witness.

The Bureau, at pp. 15-18, paras. 24-29, reaches its result by uncritically accepting at face value the self-serving testimony of Valerie Klemmer, Liberty's general partner, and that of her close friend and tower site advisor, Tim Warner. The testimony of Liberty's witnesses is not corroborated by any documentary evidence. Thus, it is entitled to little or no weight.

The Bureau, at pp. 14, 19, paras. 23, 32, discredits the testimony of Utter because it was not given live. However, Liberty and not Utter had the burden of proceeding with the evidence. Thus, it was Liberty's obligation to enforce its subpoena and to obtain Utter's live testimony in Washington, D.C. This is especially so, if Liberty wanted to impeach her credibility before

the ALJ and to cross-examine her as to any perceived inconsistencies in her prior statements.

Instead of carrying its burdens, Liberty rested with Utter's deposition testimony. Indeed, Liberty stated that it was "happy" with her not giving live testimony (Tr. 1066). Accordingly, any adverse inferences as to Utter not giving live testimony must be drawn against Liberty and not Utter.

Utter is a non-party witness with no reason to want to travel to Washington, D.C., at her own expense. She chose not to come because Liberty chose not to pay her expenses. Liberty chose not to do so, because it did not want her to come.

The Bureau, at p. 19, para. 32, discredits Utter's testimony because she initially signed a statement that she had no recollection of meeting Klemmer. However, it is not remarkable that Utter would initially forget an unremarkable meeting lasting a few minutes with a stranger some two years earlier where nothing happened at the meeting other than some "chit chat" that was meaningless to Utter.

The Bureau, at pp. 18-19, para. 29, 32, discredits Utter's testimony by mischaracterizing the testimony of Brian Lee (Tr. 2499-2501). According to the Bureau, Lee testified that Utter told him that "she would be happy to enter into a lease with [Liberty] if [it] wanted a different piece of land" and that Utter told Lee that "the possibility of a lease with [Liberty] had been discussed."

However, Lee's actual testimony was that Utter had stated that

she would only enter into a lease with those willing to pay upfront and that Klemmer had declined to do so (Tr. 2501).

The Bureau, at pp. 18-19, para. 31, fabricates testimony and attributes it to Utter. According to the Bureau, Utter's [tower site] "discussions may have touched upon, but probably did not focus upon the Lee (Orion)/Utter lease." Moreover, according to the Bureau, "... Utter probably conveyed to Warner and Klemmer that she would willingly enter into a lease after the Commission awarded the permit."

The Bureau's fabrication of testimony to support resolution of the misrepresentation issue in favor of Liberty again shows that with auctions, it is only a matter of money, and not integrity. The Bureau's comments must be discredited on this basis alone.

The Bureau, at p. 18, para. 30, asserts that the ALJ's conclusion that Klemmer did not want to pay Utter upfront for use of the tower site makes no sense in view of the "time and expense" that Liberty has since spent in prosecuting its application. However, the Bureau's comments are nonsensical and speculative. Whatever time and expense that Liberty actually incurred in the past 13 years since filing its application has no significance as to Klemmer's state of mind at the time prior to filing.

The Bureau, at p. 18, para. 31, asserts that "because a lease was not Utter's idea (but Orion's), there is no reason to conclude that she would have insisted upon Klemmer entering into a similar lease." However, in view of Utter having received an upfront payment of \$1,500 from Orion for entering into a lease just several



days before meeting Klemmer, there is every reason to believe that Utter would have then insisted on receiving a comparable amount from Liberty. The Bureau speculates that Utter would have given away use of her property to stranger based upon a meeting of only a few minutes duration.

The Bureau, at p. 19, para. 31, asserts that "had Liberty prevailed, there is nothing in the record to suggest that Orion would have constructed a tower on Utter's land simply to foreclose construction by Liberty." However, Orion would not have had to construct a tower to foreclose Liberty. It had a legally binding and exclusive lease for four years, which alone would have foreclosed Liberty. This lease is in the hearing record and was a matter of public record at the time Klemmer met with Utter (Orion Ex. 4).

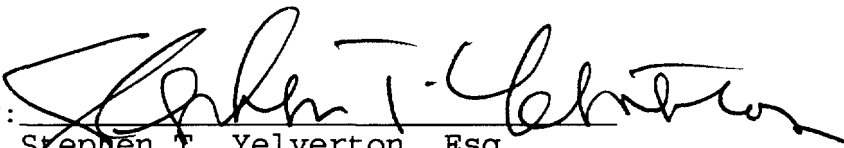
#### Conclusion

In conclusion, if Utter's testimony is properly credited and the burden of proof properly allocated, then Liberty must be disqualified for misrepresentation. Disqualification can be based solely upon Klemmer's false testimony that Utter did not tell her or Warner about the pre-existing lease with Lee/Orion (Tr. 659, 676-678, 915, 941, 978).

WHEREFORE, in view of the foregoing, Willsyr requests that its motions to enlarge the issues against Liberty and its opposition to Liberty's amendment be granted, and that the disqualification of Liberty for tower site misrepresentation be affirmed.

Respectfully submitted,

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February 29, 2000

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney at law, do hereby certify that on this 29th day of February, 2000, I have caused to be hand-delivered or mailed, U.S. Mail, first-class, postage prepaid, a copy of the foregoing "Response to Comments of the Enforcement Bureau" to the following:

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